



IN THE HIGH COURT OF PUNJAB AND HARYANA
AT CHANDIGARH

SAO-43-2014 (O&M)

Date of decision: 31.05.2024

Hardeva and others

....Appellants

Versus

Parmeshwari and others

..Respondents

CORAM: HON'BLE MR. JUSTICE ANIL KSHETARPAL

Present:- Mr. Rajinder Goyal, Advocate for the appellants

ANIL KSHETARPAL, J (Oral)

1. In this Second Appeal against the Order, the defendants no.6 to 32 pray for setting aside the First Appellate Court's order remitting the case back to the trial court for fresh decision.
2. In order to comprehend the issues involved in the present case, some relevant facts, in brief, are required to be noticed.
3. The respondents (plaintiffs) filed a suit for the grant of decree of declaration to the following effect:-

“i) That the alleged gift deed by Maghi widow and Vidyawati daughter and Baljit in favour of Ratiya son of Devtiya, Radha Krishan son of Sudan in invalid and vaguenon existent and wrong one and further sale deed dated 23.5.1962 for Rs.3000/- by Baljit in favour of Munshi etc. Of which mutation No.890 has been attested is also invalid one and thus the sale deed is liable to be set aside. Similarly, alleged gift deed by Smt. Maghi widow, Vidyawati daughter and Baljit son of Ran Singh in favour of Juglal son of Shiv Lal is also invalid, vague, non existent and wrong one and after setting aside the aforesaid gift deeds and sale, necessary decree be passed in favour of the plaintiffs for necessary correction in the revenue record and as a consequential relief plaintiffs be declared as owners



in joint possession of the suit property. Costs of the suit be also awarded in favour of the plaintiffs.

*Any other relief which this Hon'ble Court deems fit may also be granted in favour of the plaintiffs and against the defendants.
Plaint presented on 17.7.2004."*

4. After the defendants contested the suit, the trial court settled the following issues, which read as under:-

- "1. Whether sale deed executed by Megi Devi, Vidhyawati and Baljit Singh in favour of Ratiya and Radha Krishan is illegal, null and void inoperative and not bindings on the rights of the plaintiff? OPP.*
- 2. Whether sale deed dated 23.5.1962 by Baljit Singh in favour of Megi Devi and others mutation No.890 are illegal, null and void and not bindings on the rights of the plaintiff and liable to be set aside? OPP.*
- 3. Whether plaintiffs are owners in joint possession of the suit property? OPP.*
- 4. Whether plaintiffs are entitled for decree of permanent injunction? OPP.*
- 5. Whether plaintiffs have no cause of action and locus standi to file the present suit? OPD.*
- 6. Whether suit of the plaintiffs is time barred? OPD.*
- 7. Whether plaintiffs are estopped from filing the suit by their own act and conduct? OPD.*
- 8. Relief."*

5. After the parties were granted an opportunity to lead evidence, the trial court vide judgment dated 15.02.2011 dismissed the suit. The plaintiffs filed the first appeal in which an application for permission to amend the plaint was filed seeking correction to be made in the share of the parties recorded in the revenue record. The First Appellate Court has allowed the application and remitted the matter back to the trial court for deciding afresh. The enabling power of the court to remit the matter back to the lower court is regulated by Order XLI Rule 23, 23 A of the Code of Civil Procedure, 1908 (hereinafter referred to as 'CPC'). In this case, Order XLI Rule 23 CPC shall not be



applicable because the suit was dismissed after permitting the parties to lead evidence, while deciding all the issues. Hence, the court could remit the matter back to the trial court under Order XLI Rule 23 A CPC only, which reads as under:-

“23A. Remand in other cases.—Where the Court from whose decree an appeal is preferred has disposed of the case otherwise than on a preliminary point, and the decree is reversed in appeal and a re-trial is considered necessary, the Appellate Court shall have the same powers as it has under rule 23”.

6. In **P.Purushottam Reddy and Another v. Pratap Steels Ltd. (2002) 2 SCC 686**, the Supreme Court has explained the aforesaid provisions in the following manner:-

“10. The next question to be examined is the legality and propriety of the order of remand made by the High Court. Prior to the insertion of Rule 23A in Order 41 of the Code of Civil Procedure by CPC Amendment Act 1976, there were only two provisions contemplating remand by a court of appeal in Order 41 of CPC. Rule 23 applies when the trial court disposes of the entire suit by recording its findings on a preliminary issue without deciding other issues and the finding on preliminary issue is reversed in appeal. Rule 25 applies when the appellate court notices an omission on the part of the trial court to frame or try any issue or to determine any question of fact which in the opinion of the appellate court was essential to the right decision of the suit upon the merits. However, the remand contemplated by Rule 25 is a limited remand in as much as the subordinate court can try only such issues as are referred to it for trial and having done so the evidence recorded together with findings and reasons therefore of the trial court, are required to be returned to the appellate court. However, still it was a settled position of law before 1976 Amendment that the court, in an appropriate case could exercise its inherent jurisdiction under Section 151 of the CPC to order a remand if such a remand was considered pre-eminently necessary ex debito justitiae, though not covered by any specific provision of Order 11 of the CPC. In cases where additional evidence is required to be taken in the event of any one of the clause of Sub-rule (1) of Rule 27 being attracted such additional evidence oral or documentary, is allowed to be produced either before the



appellate court itself or by directing any court subordinate to the appellate court to receive such evidence and send it to the appellate court. In 1976, Rule 23A has been inserted in Order 41 which provides for a remand by an appellate court hearing an appeal against a decree if (i) the trial court disposed of the case otherwise than on a preliminary point, and (ii) the decree is reversed in appeal and a retrial is considered necessary. On twin conditions being satisfied, the appellate court can exercise the same power of remand under Rule 23A as it is under Rule 23. After the amendment all the cases of wholesale remand are covered by Rule 23 and 23A. In view of the express provisions of these rules, the High Court cannot have recourse to its inherent powers to make a remand because as held in Mahendra v. Sushila (AIR 1965 SC 365 at p.399), it is well settled that inherent powers can be availed of ex debito justitiae only in the absence of express provisions in the Code. It is only in exceptional cases where the court may now exercise the power of remand de hors the Rules 23 and 23A. To wit the superior court, if it finds that the judgment under appeal has not disposed of the case satisfactorily in the manner required by Order 20 Rule 3 or Order 11 Rule 31 of the CPC and hence it is no judgment in the eye of law, it may set aside the same and send the matter back for re-writing the judgment so as to protect valuable rights of the parties. An appellate court should be circumspect in ordering a remand when the case is not covered either by Rule 23 or Rule 23A or Rule 25 of the CPC. An unwarranted order of remand gives the litigation an undeserved lease of life and, therefore must be avoided.”

7. Order XLI Rule 23A CPC requires that the order remitting the matter back to the lower court can be passed only after the judgment of the lower court is set aside and the court deems it appropriate to order fresh trial. In this case, the First Appellate Court has not even made an attempt to discuss the merits of the case. As already noticed, it was not appropriate for the First Appellate Court to remit the matter back to the trial court merely because a formal amendment in the plaint has been allowed.

8. Keeping in view the aforesaid facts and discussion, the impugned order is set aside. The appeal is restored to its original



number. The appellants, through their learned counsel, are directed to appear before the First Appellate Court on 25.07.2024.

- 8. The Second Appeal against order stands allowed.
- 9. All the pending miscellaneous applications, if any, are also disposed of.

31.05.2024
rekha
Whether speaking/reasoned : Yes/No
Whether reportable : Yes/No

(ANIL KSHETARPAL)
JUDGE